

From: Ed Dunphy
To: Microsoft ATR
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Subject: Microsoft Settlement

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To: US DOJ
Subject: Microsoft Settlement
Date: Jan. 27, 2002

Your Honor,

I run a small independent software company (ISV) located in Campbell California which is next to San Jose. We have about 10 people and we work with programmers from all over the world. We have chosen to be in the software industry and therefore I would like to exercise my right to provide to you my opinions as a technical professional executive. Please let me first tell you a little bit about my background.

I was born in Washington D.C. in 1950. My father was a Colonel in the US Army and was in the Judge Advocate Core. He also practised in the U.S. Supreme Court and my mother worked for the Dept of Commerce. My mother's father was the Governor of Montana and another great relative was territorial Governor of Hawaii appointed by Roselvelt and bumped out of office when marshal law was enacted during the attack on Pearl Harbor.

In 1973 I received a Masters Degree in Computer Science Mathematics and Statistics from the University of New Mexico where I was raised. My professors were mostly from Sandia and Livermore Labs. Immediately after college I worked at the Air Force Weapons Laboratory with all appropriate clearances. It was 1972-3 when Microsoft started in Albuquerque working on schemes to bundle their basic interpreter with memory upgrades to the Altair (first PC).

My career took me to Massachusetts and Connecticut and back working for in computer graphics software for mechanical engineering for 15 years as a vendor, then a consumer in Combusion Engineering MIS group (which was then a Fortune 42 company) and Prime Computer Inc. a company which introduced the first LAN-intrinsic operating system and multiprocessor based 32-bit computers.

In 1986 I moved to Europe to work as a Vice President at International Computers Limited and returned to the US in 1987 to work for Sun Microsystems Inc.

Four years ago I left Sun to found InstantSoft. Inc.

I use Microsoft products every day and have for decades. I use Netscape products every day and have since they started. I have read dozens of books, talked to dozens of people and written reports and books about the software industry. I am a published author as well as an software industry expert.

I followed every minute of testimony and even downloaded Judge Jackson's opinion in the US DOJ vs. Microsoft Antitrust case. I read hundreds of the thousands of depositions that were posted online thanks to the T-1 I have to use.

It is with this near total immersion of personal and professional interests that I feel compelled to write to express my objection to the settlement proposed by the Bush Administration's US DOJ. I will set out in this letter why I believe the proposed settlement is not in the public's best interest.

I would like to share with you my strong concerns and reservations to the proposed settlement for three reasons.

1. Microsoft's competitive position as a monopolist discourages real innovation in the software industry.

The proposed settlement does not create a serious oversight function to monitor Microsoft. A vendor of this size, in an industry this dynamic, is extremely complex both technologically and structurally. There ought to be a department of the government involved in intellectual property the same way we have the Dept of Agriculture. The proposed settlement is so weak as to be disingenuous.

- o Microsoft can afford to match 1000 people for every one the US DOJ might have involved in oversight and still get an ROI out of it. Why not make Microsoft foot the bill out of penalties to fund 1000 people required to really be able to track this complex company in this highly complex industry? Microsoft's success is so huge and they have created such a mess that the US DOJ should make them fund the government's oversight rather than it being funded by the tax payers of the US. No expense should be spared to enforce our antitrust laws. This should stay in remain until Microsoft market share falls below 50%.
- o Microsoft's should no longer be allowed to conduct business that extends their monopoly. There isn't really a single remedy or set of "point remedies" that will fix this. It's impossible to predict the future, but rest assured Microsoft will be a player in the future no matter what the US DOJ does.
- o Judge Jackson's structural remedy for breakup was a logical conclusion. When Microsoft announces a new operating system, which ISVs and vendors are as "in the know" as Microsoft's own application software product groups? Applications will drive the operating system and due to its size and breadth, Microsoft can leverage its unfair competitive advantage to divisions within Microsoft giving them a completely unfair competitive advantage in terms of inside information and time-to-market. No independent software company can compete with Microsoft unless Microsoft chooses to let it be. Does the proposed settlement do anything to curb or control or monitor the infamous Chinese firewall that doesn't really exist?

2. Microsoft's illegal and unethical business conduct has made Bill Gates and 2 others from Microsoft among the 5 richest people in the world. The wealth and power of this company and its founders and senior management is simply staggering. The proposed settlement is not even a tap on the wrist to Microsoft. In fact, it will only solidify the fear that Microsoft now has more power than the US Government and the Vatican combined. The only thing Microsoft understands and seeks is money and power.

The proposed settlement does nothing to put substance behind the "you are guilty of antitrust" message. Shouldn't they really have to now change their attitude? Being a monopoly is not illegal, but once found a monopoly why would the US DOJ not take commensurate and serious actions that are more proportionate to the consequence and economic impact of their practises in the software industry. I do not see how any economist would look at the facts here and conclude that Microsoft has not profited enormously (and in my opinion largely as a consequence of unethical and illegal business practises over decades.)

- o The proposed settlement seems politically motivated. If this was oil instead of software, or Bush was from the software industry, maybe it would a different story. Is it possible that Microsoft is so elite, and so smart, and so aggressive, that it blows the minds of experts in our government as to how to deal with it in the aftermath of finding it a monopoly? This reminds me of a CEO I heard about who was shown a brand new computer that was a lot smaller and more powerful than the existing computers who said "cool, so does this mean it will take fewer people to operate since its so small?"
- o What indication does US DOJ have that Microsoft will really change its attitude and behaviour? How many times will they have to be found out before some sort of consequentiality cuts in? It should be three strikes and you are out, not three strikes and we'll let you walk anyway.
- o Should Microsoft have been allowed to fund Apple its long term rival to the tune of \$150 million just to prop it up so as not to look like it killed Apple too?
- o I'm convinced that Microsoft and its founders are so highly integrated that to take action against Microsoft and not its founders misses the whole point of understand and curbing their excessive power.

Microsoft has a legal racket. You can shut down the racket but it won't stop it. Isn't it like dealing with the mafia? Don't you have to deal with the Godfathers and the Dons? The proposed settlement does nothing to deal with the root issue. Whose behaviour needs to be changed? How is the proposed settlement going to put anybody in a position of power over the richest men in the world? This is why we have a government, to represent ALL of our interests.

- o A company that moves as much wealth out of the pockets of users and into its treasury has to be admired. But when the company is using an illegal recipe

to stay there the US DOJ can't just let it slide.
We are supposed to have and enforce the laws.

3. Finally the proposed settlement raises the price of software for consumers and raises the barrier to entry for any company with new and highly innovative software.

- o I am forced to pay a premium for often questionable value when I purchase Microsoft software. When Microsoft entered the server software market with a vengeance with Windows NT. I remember purchasing a license for \$4000 so that my Microsoft SQL Server could be accessed from the internet on the NT operating system. There was no product delivered, there was no manual, there was just a license. Don't hold me to the exact price, but this struck me as very odd and basically deceptive.
- o Microsoft, following a best practise of IBM, simply waits it out and targets any vendor who begins to acheive a level of mass market penetration not only of the for software, but in virtually any and every type of software one can imagine. If you look at the history of acquisitions by Microsoft, it is hard to square this against the claim that they are interested in innovation. The only innovation they really care about is innovation that extends their market share and dominance. Isn't this capitalism running unchecked?
- o Linux is an interesting threat to Microsoft. Why? Because a) its open source, b) its basically free and d) they can't control it. Should the government not promote open source and standards-based technologies in the interests of companies competing on the basis of excellence in implementation?
- o Microsoft's cash machine is fueled by upgrades and new releases. Microsoft actually promotes how its old software was so buggy that users will benefit by buying the new upgrade. Does this sound like a good deal to you? Linux stands in stark contrast since it is technology that does not have business dependence built into it.
- o Microsoft even capitalizes off of its own mistakes. I was amazed to have a Microsoft employee at Comdex show me with pride how you can search the 35 CDs of bug fix notes - and the CDs only cost hundreds of dollars. Is this innovation or a damn clever built-in business scheme to embed unfair competitive advantage into Microsoft every go-to-market scheme? Does the proposed settlement provide any real incentive to Microsoft to drop prices, to ship high quality product or to lower the lockin of customers and companies who have no choice but to use Microsoft products? A monopoly can get away with things that other vendors can't. They, not the customer, can dictate what options are available to the customer.

One of the areas I have spent a great deal of time researching involves best practise in business partnering. Microsoft and many other leading software vendors have purchased research reports and consulting from my company over the years. This work and direct contacts with professionals in major corporations has given me tremendous insight into how large companies work

with other companies to move their markets. The area of focus I have had has been Software partnership programs. Microsoft spends well over a billion a year on developer programs alone. A monopoly should not be allowed to use its resources to coopt and literally buy business allegiance from independent companies.

I would therefore emphasize the any proposed remedy that does not have a proper level of investment behind it is not going to be able to recognize and monitor Microsoft's approach to business. What is required is comparable to the sophistication of a small department in an intelligence agency.

Conclusions

The proposed settlement is not in the industry's or the consumers best interest. It is not really in Microsoft's interest either because the likelihood that Microsoft will be back on the hot seat in the future is inevitable. Civil actions against Microsoft will likely be impacted adversely should the proposed settlement prevail.

While I have opinions about a fair settlement, what I really expect and hope for from the US DOJ review of the proposed settlement is that it will be rejected and sent back to the drawing board as incomplete. Among the difficiencies in the proposal you might want consider stressing the following in re-defining an appropriate and fair settlement:

1. Microsoft's business, and the personal business of its leadership, need to be systemically and deeply monitored. There should be a whole series of fixes each aimed with laser precision on specific elements of their conduct of business vis a vis their competitors, their supply chain and their business partnership agreements. What is needed are a sequence of precision hits not carpet bombing. The proposed settlement should define a far more robust process behind it that is auditable. The audit results and conclusions should be presented to an independent advisory council composed of good people that can contribute value in the process. The record of Microsoft's involvement in standards bodies should be monitored to ensure they are participating in advancement of the industry and not just themselves. The participation of members of these standards bodies participation in such an independent advisory council might also be recommended.
2. You can't aim a remedy let alone deliver it with 2 troops on the ground. The US DOJ needs to put a small army to deal with this form of sophistication in unfair corporate practise.

The government needs to provide safe harbor for competitors of Microsoft. Microsoft should not be above the American legal system. The proposed settlement needs to demonstrate to the American public that the settlement gives the government sufficient resources to deal with Microsoft everytime they stray out of their box and that the box itself will need to be reexamined and adapted every quarter as industry dynamics change.

There should be a proposed budget to support whatever the watchdog group is that is setup. That budget has to be at least a few orders of magnitude higher that

it currently is to have an credibility compared to what is at stake here.

3. Microsoft's monopoly should be viewed as putting them in the category of a monitored utility. Since everybody needs what Microsoft produces and especially since Microsoft has demonstrated its ability to kill its competitors. Their behaviour and history demands a serious regulatory oversight. While DOJ stopped the Intuit acquisition there should be a hundred times more scrutiny applied to their actions now that they are a certified monopoly. Self-policing is a non-starter. The proposed remedy might recognize that Microsoft has more resources than the US DOJ. The proposed settlement should recognize the unique technological stranglehold Microsoft has on the computer and software industry. Perhaps limits can be placed on just how far Microsoft should be allowed to tie the government itself up in knots while maximizing their lobbying and soft money contributions to politicians.
4. Since a structural remedy seems to drastic, surely Microsoft should be made to give back some of their ill-gotten gains. Not only should the Government fine them in an ongoing way to cover its costs of oversight and regulation, but it should go further to ensure that those responsible for future abuses will be face consequences and that means those in charge at the top. The proposed remedy should define clear consequences not just to the Microsoft corporation but to key officers who continue to engage in illegal and unethical conduct.
5. Microsoft should be made to defend every pricing action, every new product introduction, every upgrade, every acquisition, every ad campaign and so on. They have not only banked a fortune but they seem to have created a possibly unstoppable franchise. The government should realize that corrective actions will take time and that its job has only started.
6. It strikes me as unusual that the US DOJ would not seriously consider consulting with the appropriate ministries especially in Europe where the jury is still out on how the governments will come down on Microsoft antitrust. Would it not be better to coordinate with them on matters of intellectual property? While Robinson Patman might have no corollary in the rest of the world and while it might be imperfect, would it not be prudent to demonstrate a more coordinated response to Microsoft to get their attention?

In conclusion, it seems only reasonable to explain why I took the time to write to you. I am an American entrepreneur in the software industry. It strikes me that there is no logical explanation why the US DOJ proposed settlement is in the best interests of the general public. As a highly informed and concerned professional it is great to have the opportunity to provide you with these comments.

In the name of innovation, Bill Gates is allowed to effectively create a tax on the Microsoft installed base by creating an incompatibility or discontinuity in technology that virtually forces me to have to get upgrades and screw

with my computers not because I want to but because there is no other choice. Microsoft should be monitored in terms of its compliance with industry standards so they can not go their way when the industry needs to go the way of open source and standards based computing.

When multitasking preemptive kernel source code is available for free off the web, why don't I use it? The answer is usually applications.

Microsoft refuses or can't or won't put their applications on any open source GPL or public domain operating system. The computer industry will only be healthy and grow if open market forces are allowed to function. The industry is out of balance and luckily, finally, the government recognized it. Now the government should take the lead to ensure that the richest man in the world and his friends don't stifle commerce and extract excessive profits from the general public as well as the American government because they can as a monopoly.

I believe that Microsoft is far more calculated than parts of the FBI or CIA. Don't let this monopoly dampen innovation and value creation in such a critical industry. Computing is now as pervasive as any utility. We do not want one utility vendor buying the market out and killing competitors and then setting whatever price they want. We need to restore competition which will create more innovation, reduce prices through open market competition and provide some relief from the imposition of a ongoing Microsoft tax on all of us.

Your decision regarding the proposed settlement is really about the fundamental right to no taxation without representation. As agents of the public interest, please give this matter the serious consideration it deserves despite its complexity.

Thanks for hearing me out.